IN THE EXECUTIVE ETHICS COMMISSION
OF THE STATE OF ILLINOIS

IN RE: NICOLE D. FAYANT	)	No. 23-EEC-001
	)	
	)	Appeal of OEIG
	)	Revolving Door
	)	Determination

DECISION

This cause is before the Executive Ethics Commission ("Commission") on appeal by Nicole D. Fayant ("Appellant") from a determination by the Office of the Executive Inspector General for Agencies of the Illinois Governor ("OEIG"). Appellant appears by and through her attorney Carl R. Draper. The OEIG is represented by Assistant Attorneys General Hannah Jurowicz and Neil McDonald on behalf of the Office of the Attorney General.

FINDINGS OF FACT

The record of proceedings has been reviewed by the members of the Executive Ethics Commission. The record consists of (i) the OEIG's Revolving Door "Restricted" determination of August 11, 2022, that Appellant could not take employment with the Ciorba Group, Inc. ("Ciorba") due to Appellant's having participated personally and substantially in the issuance of four change orders to Ciorba in December 2021, April 2022, May 2022, and August 2022 and in the fiscal administration of the prime contract with Ciorba for the Bob Michel Bridge Deck Rehabilitation project ("Project"); (ii) the OEIG's file supporting that determination; (iii) Appellant's appeal, received effective August 22, 2022; (iv) the Attorney General's Response in Opposition To An Appeal From A Revolving Door "Restricted" Determination ("Objection"); and (iv) Appellant's Reply in Support of Appeal. The Commission received no public comment regarding this matter.

Based upon this record, the Commission makes the following findings of fact:

1. Appellant began her employment with the Illinois Department of Transportation ("Department") as a Civil Engineer II in March 2017 and has been classified as a Civil Engineer V since November 2020.

2. The Department's position description for the Civil Engineer V position requires the employee to hold current registration as a Licensed Professional Engineer in the State of Illinois and eight years of experience in civil engineering, including four years of supervisory responsibility. The position description also provides:

> "The incumbent must have the ability to recognize the necessity to deviate from current procedures to resolve issues relative to a project. The incumbent must

> effectively apply a wide range of federal and state statutes, procedures and policies to secure project approvals and prepare studies, plans, and contract documents within the established schedules for construction lettings."
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> * * *
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> "This position is responsible for determining the scope, location, design, cost, and environmental impact of transportation improvements . . . The incumbent directs the reviews of consultant's work. This position ensures the timely completion of plans and specifications so that projects can be placed under contract by predetermined schedules. . . The incumbent is also involved in making recommendations on manpower, equipment needs and operating budget needs for the bureau."
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> * * *
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> "The incumbent has broad latitude to resolve problems arising within his/her area of responsibility"

3. As a Civil Engineer V, Appellant reports to the Department's Studies and Plans Engineer and oversees three Department Project Engineers (PE) that are Civil Engineers III or Civil Engineers IV.

4. Ciorba provides professional engineering services to state and local governmental entities. Ciorba's services "include preliminary, design and construction engineering for highways, bridges and structures, municipal engineering, water resources, site engineering, facilities management and lighting."

5. On or about November 17, 2020, Ciorba and the Department executed an agreement with the State of Illinois (Prime Agreement) under which Ciorba was "to furnish certain professional services in connection with Phase I and II engineering services for" the Project. The scope of work for the Project was for Phase I services only and included the preparation of a project development report; a bridge condition report; a traffic management plan; a type, size, and location plan; and preliminary roadway plans.

6. Prior to the execution of the Prime Agreement, Appellant participated in defining the Agreement's scope of work and negotiating "manhours" to serve as the basis for calculating Ciorba's compensation.

7. The Project's scope of work contained several pages of details with respect to how and what was to be done and specified, "No lane closures will be allowed while Illinois Route 40 is being used as the Murray Baker bridge I-74 detour route." The scope also stated that Phase II would be a "planned supplement."

8. Compensation for services was to be paid on the basis of actual payroll rates plus direct costs and/or unit costs and a fixed fee, all subject to a total agreement amount of $972,230. Ciorba was to receive $509,717 of that amount, with the rest earmarked for subconsultants.

9. Subsequent to the execution of the Prime Agreement, the Department and Ciorba executed five supplemental agreements, all but one of which were executed within the year immediately preceding Appellant's notification to the OEIG or later.

10. As a Civil Engineer V, Appellant served as the Department's Project Engineer (PE) for the Project and was designated internally as the "Consultant Liaison" for Phases I and II of the project. As the Consultant Liaison, Appellant served as the Department's point of contact with Ciorba, was the administrator of the Project, and oversaw the contract.

11. In her role as Consultant Liaison, Appellant was responsible for reviewing the accuracy of change orders, invoices, and requests for supplementation to the Prime Agreement. Appellant's reviews were forwarded to her supervisor, the Studies and Plans Engineer, for final approval.

12. Appellant and her supervisor independently reviewed Ciorba's proposed "manhour" and scope supplements to the Prime Agreement in accordance with their individual engineering experience. Their reviews did not utilize a standard formula for calculating the number of "manhours" it would take to complete a given task. Rather, Appellant and her supervisor examined the supplements for reasonableness based on their experience as engineers.

13. In the case of discrepancies between the independent reviews of the supervisor and Appellant, the supervisor would not forward the supplement for approval until the discrepancy was resolved between them.

14. Appellant's supervisor stated that Appellant was involved in the fiscal administration of the contract and change orders with Ciorba Group and that Appellant was integral in the Department's review and during the decision-making process for final approvals. Appellant's supervisor further stated that negotiations for cost estimates occur at his and Appellant's levels and that he was unsure whether the "Central Office" takes a direct role in negotiations.

15. Executed on December 27, 2021, the Second Supplemental Agreement added an intersection design study to the scope of work and added $18,580 to the total agreement amount.

16. Appellant reviewed the scope of work to be performed in the Second Supplemental Agreement along with the Department's Geometric Engineer. Appellant's review of the Second Supplemental Agreement was to ensure that Ciorba did not utilize the highest hourly rates in their "manhour" estimates. Appellant was responsible for communicating with Ciorba whether the Department disagreed with Ciorba 's estimates and determining whether Ciorba could or would submit a counteroffer for Department review.

17. Executed on April 5, 2022, the Third Supplemental Agreement revised an intersection design study and extended the date for completion of an element of the work from August 26 to October 21, 2022.

18. Appellant reviewed the Third Supplemental Agreement and worked back and forth with Ciorba to determine the appropriate hours for Ciorba 's proposed use of a subconsultant for the completion of work.

19. Executed on May 26, 2022, the Fourth Supplemental Agreement established Phase II services to be provided by Ciorba and compensation for these previously unspecified services in the amount of $562,425, which was added to the total agreement amount. Services included the provision of contract plans and specifications for the construction contract for the Project with a goal of completion in time for a contract letting in November 2022.

20. Appellant's involvement with the Fourth Supplemental Agreement consisted of compiling the best scope of work estimates from a number of Department divisions and reviewing and gathering input from within the Department on Ciorba's estimated "manhours". Appellant was responsible for communicating the Department's comments and estimates back to Ciorba for any potential counteroffers. A counteroffer was received from a Ciorba subconsultant, and after a back and forth between Appellant and Ciorba, an agreement was reached on estimated subconsultant hours.

21. Signed by Ciorba on July 28, 2022, and by the Department on August 1, 2022, the Fifth Supplemental Agreement called for an update to the traffic management plan and added $14,432 to the total agreement amount.

22. Appellant, along with other Department employees, reviewed the Fifth Supplemental Agreement for Ciorba's estimated scope of work and "manhours". Ciorba elected not to counteroffer a Department request to lower the estimated "manhours" needed to complete contractual tasks.

23. The record contains several Ciorba invoices that contain checkmarks next to various dollar entries on the invoice form along the Appellant's initials ("NDF") on a line labeled "Checked" next to a date within a year preceding the OEIG's determination. (See OEIG-FAYANT-252, -279, -302, -367, -469, -567, -591, and -1065.) In at least one instance, it appears Appellant adjusted an invoiced amount. OEIG-FAYANT-567. The space for marking the invoice checked appears directly below a line for approval by another Department employee and below a statement reading,

> "I have reviewed the invoice and found it in compliance with "Invoicing Procedure Guide for Project Managers" published on the Preliminary Engineering SharePoint site. The percent of work shown as completed on this invoice matches the attached Progress Report signed by the project engineer."

24. Appellant was actively searching for new employment when, in acting in her capacity as a Department Employee, she was informed of Ciorba employment opportunities by Ciorba employees. Appellant applied for the position of Roadway Project Manager and participated in a formal interview process on May 26, June 10, and June 17, 2022. Appellant then received an offer of employment on July 25, 2022.

25. Appellant's proposed end date of State employment was to have been August 31, 2022, and she was to have commenced employment with Ciorba on September 6, 2022.

26. Appellant would like to accept Ciorba's offer of employment for the position of Roadway Project Manager, a position in which appellant would be involved in providing technical direction to staff in the preparation of engineering studies, reports, and plans. The annual compensation for the prospective position is $130,000, with overtime opportunities at a rate of $62.50 per hour for time worked in excess of 40 hours per week.

27. Appellant's position at the Department has been classified as a c-list position, meaning that it has been identified as a position that may have the authority to participate personally and substantially in the award or fiscal administration of State contracts or grants or the issuance of State contract change orders or in licensing and regulatory decisions for purposes of subsection (c) of section 5-45 of the State Officials and Employees Ethics Act ("Ethics Act")(5 ILCS 430/5-45(c)) and that Appellant would be required to notify the OEIG before accepting an offer of non-State employment pursuant to subsection (f) of that section.

28. On November 2, 2020, Appellant acknowledged receipt and understanding of the c-list revolving door prohibitions in section 5-45 via her signature appearing on the Department's form titled "Notice and Acknowledgement of Receipt of Revolving Door Provisions (5 ILCS 430/5-45)."

29. Appellant submitted her Revolving Door Notification of Offer form (RD-101) to the OEIG regarding Ciorba's offer of employment on July 28, 2022. In that submission, Appellant expressly declared that she was required to notify the OEIG of Ciorba's employment offer under 5 ILCS 430/5-45(f). Appellant also declared that she had, in the year prior to termination of his employment, administered a contract, grant, or change order, or served as a contact person for a contract, grant or change order involving her prospective employer.

30. Appellant also stated on her RD-101 with regard to the Ciorba contract, "In my role I am the department contact and I also administer and oversee the contract. I also monitor how the project is progressing, review engineering plans, and review invoices." She stated further, "In the past year, I coordinated the review of "manhours" and direct costs with the District and Central Office for the following Supplements for [the Prime Agreement]:

    - Supplement 2 - Phase I Work (executed 12/27/2021) for $18,580,
    - Supplement 3 - Phase I Work (executed 4/6/2022) for zero dollars,
    - Supplement 4 - Phase II Work (executed 5/26/2022) for $562,425."

31. On August 1, Appellant's ethics officer submitted an RD-102, the form used to complete an employee's notification of the OEIG by providing information regarding the award of contracts or issuance of change orders to Ciorba or the fiscal administration of contracts with Ciorba.

32. Appellant was interviewed by the OEIG on two occasions: August 4, 2022, and August 10, 2022.

33. On August 11, 2022, the OEIG determined Appellant was restricted from accepting the employment opportunity with Ciorba on the basis of her "personal and substantial

participation in the issuance of four change orders (Supplemental Agreements for Consultant Engineering Services) to Ciorba in December 2021, April 2022, May 2022, and August 2022." The OEIG further determined that her "personal and substantial participation with these Supplemental Agreements for Consultant Engineering Services also constitutes 'fiscal administration' of the prime contact with Ciorba for the Rob Michel Bridge Deck Rehabilitation project."

34. On Monday, August 22, 2022, Appellant submitted an appeal of that determination to the Commission. The Attorney General provided Appellant and the Commission with a copy of the OEIG's complete determination file the same day.

35. The Attorney General filed an Objection to the appeal on August 27, 2022.

36. Appellant filed a reply to the Objection on August 29, 2022.

37. In accordance with 5 ILCS 430/5-45(g), the Commission has sought written public opinion on this matter by posting the appeal on its website and posting a public notice at its offices in the William Stratton Building in Springfield, Illinois.

CONCLUSIONS OF LAW

1. At all times relevant to this matter, Appellant was a "State employee" for purposes of the State Officials and Employees Ethics Act (5 ILCS 430). 5 ILCS 430/1-5.

2. Section 5-45 of the State Officials and Employees Ethics Act (5 ILCS 430/5-45) establishes revolving door prohibitions, notification requirements, and procedures for making and appealing determinations as to the applicability of the prohibitions. The relevant revolving door prohibition is found in subsection (a) of that section, which provides, in part:

> "No former officer, member, or State employee, or spouse or immediate family member living with such person, shall, within a period of one year immediately after termination of State employment, knowingly accept employment or receive compensation or fees for services from a person or entity *if the officer, member, or State employee, during the year immediately preceding termination of State employment, participated personally and substantially in the award or fiscal administration of State contracts, or the issuance of State contract change orders, with a cumulative value of $25,000 or more to the person or entity, or its parent or subsidiary.*"
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> 5 ILCS 430/5-45(a) (Emphasis added.)

3. Appellant's job title is properly classified as a "c-list" position pursuant to §5-45(c) of the Ethics Act because a person in that position may possess the authority to participate personally and substantially in the award or fiscal administration of contracts. 5 ILCS 430/5-45(c).

4. Subsection 5-45(f) provides:

> "Any State employee in a position subject to the policies required by subsection (c) or to a determination under subsection (d), but who does not fall within the prohibition of subsection (h) below, who is offered non-State employment during State employment or within a period of one year immediately after termination of State employment shall, prior to accepting such non-State employment, notify the appropriate Inspector General. Within 10 calendar days after receiving notification from an employee in a position subject to the policies required by subsection (c), such Inspector General shall make a determination as to whether the State employee is restricted from accepting such employment by subsection (a) or (b). In making a determination, in addition to any other relevant information, an Inspector General shall assess the effect of the prospective employment or relationship upon decisions referred to in subsections (a) and (b), based on the totality of the participation by the former officer, member, or State employee in those decisions. A determination by an Inspector General must be in writing, signed and dated by the Inspector General, and delivered to the subject of the determination within 10 calendar days or the person is deemed eligible for the employment opportunity."
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> 5 ILCS 430/5-45(f).

5. Pursuant to Commission rule, the employee's notification to an Executive Inspector General under subsection 5-45(f) must include several elements, including a statement from the employee's ethics officer that identifies agency contracts and regulatory or licensing decisions of the agency over the previous 12 months that involve the employee's prospective employer. 2 Ill. Adm. Code 1620.610(c).

6. An Executive Inspector General's determination regarding revolving door restrictions may be appealed to the Commission by the person subject to the decision or the Attorney General no later than the 10th calendar day after the date of the determination. 5 ILCS 430/5-45(g).

7. Appellant's appeal of the OEIG's August 11, 2022, revolving door determination is properly before the Commission, and the Commission has jurisdiction to consider the appeal.

8. Subsection 5-45(g) provides, in part:

> "In deciding whether to uphold an Inspector General's determination, the appropriate Ethics Commission or Auditor General shall assess, in addition to any other relevant information, the effect of the prospective employment or relationship upon the decisions referred to in subsections (a) and (b), based on the totality of the participation by the former officer, member, or State employee in those decisions."
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> 5 ILCS 430/5-45(g)

9. The OEIG's "restricted" determination was issued to the Appellant in a timely manner in accordance with Subsection 5-45(f), which provides, in part:

> "Within 10 calendar days after receiving notification from an employee in a position subject to the policies required by subsection (c), such Inspector General shall make a determination as to whether the State employee is restricted from accepting such employment by subsection (a) or (b)."
>
> 5 ILCS 430/5-45(f)

10. The Appellant participated personally and substantially in the issuance of four contract change orders with Ciorba occurring in December 2021, April 2022, May 2022, and August 2022 and is subject to the provisions of Subsection 5-45(a).

11. The Appellant participated personally and substantially in the fiscal administration of the contract with Ciorba and is subject to the provisions of Subsection 5-45(a).

12. Based upon the totality of the circumstances, the Commission denies the appeal from the Office of the Executive Inspector General's August 11, 2022, determination that Appellant is restricted from the offer of employment from Ciorba.

ANALYSIS

The OEIG determined that Appellant is restricted from accepting employment with Ciorba pursuant to section 5-45(a) of the Ethics Act in that she had, in the 12 months immediately preceding her anticipated termination of State employment, personally and substantially participated in the issuance of four change orders to Ciorba – the Second, Third, Fourth, and Fifth Supplemental Agreements. The OEIG also asserted that this personal and substantial participation in the supplemental agreements constituted fiscal administration of the Prime Agreement that would also violate the prohibition.

Appellant argues that her appeal be affirmed because the supplemental agreements are not change orders but merely supplement the Prime Agreement by having Ciorba provide additional services and because she had no decision-making responsibility and no other personal or substantial participation in the initiation of the supplemental agreements or in the approval process; she asserts she had no responsibility to make any recommendations. In addition, Appellant argues that OEIG determination was untimely in that it was delivered more than 10 days after Appellant notified the EIG and the ethics officer of receipt of Ciorba's offer of employment and that the Commission exceeded its authority when it adopted a rule that effectively extends the time in which the OEIG must act.

1. **The OEIG's delivery of the determination that employment was restricted was not untimely.**

Section 5-45(f) of the Ethics Act provides, in pertinent part:

> "Any State employee . . . who is offered non-State employment during State employment or within a period of one year immediately after termination of State employment shall, prior to accepting such non-State employment, notify the appropriate Inspector General. Within 10 calendar days after receiving notification . . . such Inspector General shall make a determination as to whether the State employee is restricted from accepting such employment by subsection (a) or (b). . . . A determination by an Inspector General must be in writing, signed and dated by the Inspector General, and delivered to the subject of the determination within 10 calendar days or the person is deemed eligible for the employment opportunity."
>
> 5 ILCS 430/5-45(f).

The statute is silent as to what constitutes proper notification of the OEIG by the employee. Thus, the Commission addressed that aspect when it adopted a Revolving Door rule (2 Ill. Adm. Code 1620.610) in accordance with the procedures of the Illinois Administrative Procedure Act (5 ILCS 100) with respect to the procedural aspects of the implementation of the revolving door prohibition. The rule provides that the "employee's notification to the appropriate Executive Inspector General must include" six elements, including:

> "6) a statement from the Ethics Officer or Officers of the State agency or agencies employing the employee in the last 12 months that identifies any contracts the prospective employer, or its parent or subsidiaries have had with the State agency or agencies in the last 12 months, the amounts of those contracts, any regulatory or licensing decisions made by the State agency or agencies in the last 12 months that applied to the prospective employer or its parent or subsidiary, whether the employee was involved in any regulatory, licensing or contracting decisions regarding the prospective employer or its parent or subsidiary within the last 12 months, and if the employee was involved, a description of that involvement. If the Ethics Officer is the employee seeking the determination or is unable for any reason to provide this statement, the Executive Inspector General may consider a statement provided by another appropriate employee or officer. The statement from the ethics officer must be submitted to the appropriate Executive Inspector General within 5 calendar days after receiving notification from the employee."
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> 2 Ill. Adm. Code 1620.610(c)(6) at https://www.ilga.gov/commission/jcar/admincode/002/002016200F06100R.html.

Using the RD-101 form prescribed by OEIG, Appellant submitted her notification form to the OEIG on July 28, 2022, and, according to her appeal, a blank form RD-102 to her ethics officer. Although most of the required notice elements are included, the RD-101 does not call for identification of all the contracts and change orders the prospective employer may have with the

agency, The RD-102 addresses, among other things, information about the prospective employer's contracts and change orders generally as well as the departing employee's job responsibilities with respect to those contracts and change orders. The ethics officer submitted the RD-102 to the OEIG on August 1 without providing a copy to the Appellant.

When filing her appeal, Appellant was not yet aware that the RD-102 had been filed on August 1 – within the five-day period prescribed by the rule. On August 29, the seventh of the Commission's ten days in which to make a decision on an appeal, Appellant filed a Reply in Support of Appeal in response to the Attorney General's Objection in which Appellant raised for the first time the argument that the rule exceeded the Commission's authority. The Attorney General has not responded to the Reply.

The statute that creates an administrative agency defines the agency's authority to adopt rules and regulations, and an administrative regulation carries the same presumption of validity as a statute. See *Minifee v. Doherty*, 333 Ill. App. 3d 1086, 1088-89, 777 N.E.2d 510, 512-13 (1st Dist. 2002) and authorities there cited. An administrative agency has authority to promulgate rules as is conferred by express provision of law or is found, by fair implication and intendment, to be incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which the agency was created, and a court will not set those rules aside unless they are clearly arbitrary, unreasonable or capricious. *Aurora East Public School District v. Cronin*, 92 Ill. App. 3d 1010, 1014, 415 N.E.2d 1372, 1375-76 (2nd Dist. 1981).

Section 20-15 of the Ethics Act provides that it shall be the duty of the Commission "to promulgate rules governing the performance of its duties and the exercise of its powers and governing the investigations of the Executive Inspectors General." 5 ILCS 430/20-15(1). In considering an appeal of an OEIG determination, the Commission is to consider not only the information presented to it with the determination, but public comments and any other relevant information and make a decision based upon the totality of the employee's participation in the contract award, change order issuance, fiscal administration of contracts, and/or regulatory or licensing decisions. 5 ILCS 430/5-45(g). Section 5-45(f) does not specify what must be included in the notice, but the notice would not be effective if it did not include the basic information needed for the EIG and EEC to make their decisions. It is not unreasonable for the Commission to exercise its rulemaking power to prescribe the elements of the notice, including information regarding the contracts the prospective employer has with the employee's agency.

Under a prior version of the statute and the implementing rules, the employee was required to present the same type of information in support of a request to waive the revolving door prohibition; the current rule actually relieves the burden on the employee to gather that information. See Notice of Adopted Amendments to 2 Ill. Adm. Code Part 1620, 34 Ill. Reg. 13108, 13125-13128 (September 10, 2010).

Appellant argues that the rule gives the employee no control over the situation and directs the ethics officer to provide a "report" to the OEIG and not to the employee. The rule, however,

provides, "The employee's notification to the appropriate Executive Inspector General must include" the statement of the ethics officer and that that statement must be submitted to the EIG. In support of her appeal, Appellant provided a copy of a "Notice and Acknowledgement of Receipt of Revolving Door Provisions (5 ILCS 430/5-45)" that she had signed. Exhibit 2 to Appeal. That document included the statement, "I understand that once my notification to the OEIG is complete, as set forth in the Administrative Code," a determination by the OEIG would be made. The document also included a recitation in bold face type that the employee understood that further information about the process could be found at the OEIG's website and, in digital format, provided two links (one for Revolving Door Instructions and Forms, and the other to Revolving Door FAQs).

The Commission's rule is a valid and reasonable exercise of its rulemaking powers. The ethics officer's statement was delivered to the OEIG in four days, and the OEIG's determination was issued within 10 days after the employee's notification was completed in accordance with 2 Ill. Adm. Code 1620.610(c). The determination was not, therefore, untimely.

2. The Second through Fifth Supplemental Agreements constituted change orders issued to Ciorba.

The OEIG issued a determination that Appellant was restricted from accepting employment with Ciorba on the basis of Appellant's personal and substantial participation in the issuance of four change orders that took the form of Supplemental Agreements with Ciorba between December 2021 and August 2022 with a cumulative value of $25,000 or more. Appellant argues that the Supplemental Agreements were not change orders because each agreement was initiated by other Department staff to supplement the underlying Prime Agreement by requiring the consultant to provide certain additional professional services without adding more cost to the Project.

The Attorney General's Response in Opposition to the Appeal aptly summarizes at pp. 7-8, a recent Commission decision regarding what constitutes a change order as follows:

> "Although the Ethics Act does not define the term 'change order,' the Commission recently examined the difference between 'change orders' and "contract adjustment," as defined in laws and rules applicable to IDOT. *In re Strough*, No. 22-EEC-003 (June 13, 2022), at pp.9-10. The Commission relied on near-identical definitions in the Illinois Procurement Code, 30 ILCS 500/1-15.12, rules of the Chief Procurement Officer for IDOT, 44 Ill. Adm. Code 6.40, and the section of the Criminal Code on public contracts, 720 ILCS 5/33E-2, which all define "change order" as:
>
> > [a] change in a contract term, ***other than as specifically provided for in the contract***, which authorizes or necessitates any increase or decrease in the cost of the contract or the time [for] completion[.]
>
> *Id.* (emphasis added). 'Consistent across these definitions…is the idea that the term does not encompass changes for which the contract specifically provides.' *In re Strough*, No. 22-EEC-003, at p.10.

> The Commission contrasted this with a rule defining 'contract adjustment' as 'a written price adjustment that adds to or deducts from a contract in accordance with provisions included in the original contract, including but not limited to increases or decreases in quantities, incentives, changed conditions and the addition of missing pay items called for in the specifications.' 44 Ill. Adm. Code 6.40 (emphasis added)."

The record contains copies of the Prime Agreement and each of the Supplemental Agreements. The Second Supplemental Agreement added to the contract an intersection design study. The Third called for revision of a study and an extension of the completion date. The Fourth brought into the contract for Phase II multiple sets of services that were not specified in the Prime Agreement for Phase I, including the provision of contract plans and specifications for construction. Each of these changes was for services other than as specifically provided for in the contract.

Of course, participation in the issuance of change orders does not subject the employee to employment restriction unless the change orders have a cumulative value in excess of $25,000. Appellant argues that the supplemental agreements added no more cost for the project. The Prime and Supplemental Agreements indicate that the Project is a bridge deck rehabilitation that is to be completed in October 2030. The Prime Agreement with Ciorba, on the other hand, is for planning in Phases I and II resulting in the letting of a construction contract in November 2022. Thus, it is clear that the Prime Agreement is only one part of the Project. The Supplemental Agreements in the last year increased the total amount to be paid under the Prime Agreement with Ciorba by nearly $600,000. That the increases may not have affected the total amount for the entire Project, is irrelevant to whether the value to Ciorba, the prospective employer, has been increased.

3. Appellant personally and substantially participated in the issuance of change orders to Ciorba.

Appellant argues that she did not initiate the issuance of change orders or have final decision-making authority or have any responsibilities to make recommendations with respect to them. Rather, she states, her participation was that of a liaison with involvement limited to ministerial coordination between Ciorba and others at the Department.

The statute, however, requires neither that the employee has initiated nor made the final decision for the restriction to apply. Rather, it requires personal and substantial participation in the issuance. As the Commission has discussed in another recent matter, "personal and substantial" participation refers to participation that is direct, extensive, and substantive, as opposed to peripheral, clerical, or formal. "Substantial participation" means the involvement is of significance to the matter and can occur when, for example, the employee participates through the making of recommendations, investigating, or rendering advice. *In re Slaughter*, No. 22-EEC-001 (August 2, 2021), p. 8.

For purposes of her appeal, Appellant characterizes her work with respect to the Supplemental Agreements as ministerial, but her job description, the statements she submitted with her RD-101, and the statements of she and her supervisor in their interviews lead the Commission to a different conclusion. She applied experienced, professional judgment to negotiations regarding the hours of what kinds of services were to be devoted to contract performance and the rates at which the hours would be paid – aspects critical to the formation of a contract. That someone else may have initiated the change process and that yet another had the ultimate responsibility to make the decision did not mean that her participation in the issuance of the change orders was not personal and substantial.

Therefore, the Commission determines that Appellant personally and substantially participated in the issuance of change orders with Ciorba with a cumulative value of $25,000 or more.

4. Appellant personally and substantially participated in the fiscal administration of contracts with Ciorba.

The EIG determination states that Appellant's personal and substantial participation in the issuance of change orders (the Supplemental Agreements) also constitutes fiscal administration of the Prime Agreement for purposes of section 5-45(a) of the Ethics Act, which restricts employment with an entity when the employee participates personally and substantially in the fiscal administration of a contract with the entity. The issuance of change orders with respect to a contract and fiscal administration of a contract, however, are not equivalents. If they were, there would have been no need to add "fiscal administration" to the restriction language as was done by Public Act 102-664, effective January 1, 2022.

The Attorney General's Response in Opposition, however, argues that other involvement by Appellant constituted "fiscal administration" of the Prime Agreement, including Supplemental Agreements. The term "fiscal administration" is not defined in the Ethics Act or in any other Illinois statute, nor are there Illinois cases defining the term. Generally speaking, fiscal administration is a term that is used to refer to the management of revenue collection, expenditures, and budgets for governments and other public service entities. (See https://www.historicalindex.org/what-is-fiscal-administration.htm (last accessed on 8/30/22) andhttps://www.bartleby.com/essay/History-of-Fiscal-Administration-and-the-Theory-FKPZ7J43RYYS (last accessed on 8/30/22)). In the context of what it means to participate in the fiscal administration of a contract, it would appear that the term was intended to refer to the management of contract payments – such things as making sure services are provided as contracted, billing conforms to contractual requirements, and payments are made at agreed upon rates and times and within contractual limits.

As with contract awards and change order issuance, a State employee's involvement in the fiscal administration of a contract needs to be personal and substantial before an employment restriction is triggered, and the same principles as described above with respect to change order

issuance would apply. Thus, the participation would need to be direct, extensive, significant, and substantive, as opposed to peripheral, clerical, or a formality before employment would be restricted. As the Attorney General points out, the mere fact that one does not make final decisions or does not have official responsibility over a matter does not mean the employee does not exercise substantial judgment to effectuate steps that are necessary to the ultimate execution or decision.

Appellant had weekly involvement with Ciorba representatives and made substantive checks of invoices before approval for payment would be given, even having made changes in an invoice on at least one occasion. (See OEIG-FAYANT-252, -279, -302, -367, -469, -567, -591, and -1065.) Appellant acknowledged in her interview that she reviews the project's progress, engineering plans, and invoices, which she then forwards for approval, saying she was responsible for reviewing the invoices for accuracy. Her supervisor said Appellant had been involved in the fiscal administration of contracts and integral to the review of contracts and invoices and an important voice in the approval process.

Considering the totality of the circumstances and all relevant information presented, the Commission finds that, within the year preceding her proposed termination of State employment date, Appellant participated personally and substantially in the issuance of contract change orders with a cumulative value in excess of $25,000 to Ciorba and in the fiscal administration of a contract valued at more than $25,000 with Ciorba.

WHEREFORE, the Commission denies Nicole D. Fayant's appeal and upholds the OEIG's determination that Ms. Fayant is restricted from accepting employment with Ciorba Group, Inc.

SO ORDERED.

DATE: September 1, 2022

The Executive Ethics Commission

By: [redacted]
Michelle Casey
Executive Director on behalf of
the Executive Ethics Commission